

FILED
U. S. DISTRICT COURT
DISTRICT OF NEBRASKA
2011 SEP 22 PM 1:52

4:09CV3249

FINAL JURY INSTRUCTIONS

Defendants.

INSTRUCTION NO. 1

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of and during the trial are not repeated here.

INSTRUCTION NO. 2

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

During this trial I may have occasionally asked questions of witnesses in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions related.

INSTRUCTION NO. 3

You are reminded that you are not to engage in any independent investigation of this case. For instance, do not conduct research on the Internet about this case or about anyone involved with it, and do not consult a dictionary.

INSTRUCTION NO. 4

In these instructions you are told that your verdict depends on whether you find certain facts have been proved. The burden of proving a fact is upon the party whose claim depends upon that fact. The party who has the burden of proving a fact must prove it by the greater weight of the evidence.

The greater weight of the evidence means evidence sufficient to make a claim more likely true than not. A greater weight of the evidence does not necessarily mean a greater number of witnesses or exhibits.

A party is entitled to the benefit of any evidence tending to establish that party's contention even though such evidence was introduced by another. If the evidence upon a claim is evenly balanced or if it weighs in favor of the other party, then the burden of proof has not been met.

INSTRUCTION NO. 5

The plaintiff and the defendants have stipulated—that is, they have agreed—that certain facts are uncontroverted. You should, therefore, treat these facts as having been proved:

1. Plaintiff, Patrick Ronald Russell, is an inmate incarcerated within the custody and control of the Nebraska Department of Correctional Services (NDCS).

2. Defendant Robert Houston is, and was at all times relevant, the Director of the Nebraska Department of Correctional Services.

3. Defendant Dennis Bakewell is, and was at all times relevant, the Warden of the Nebraska State Penitentiary.

4. Defendant Mike Edison is, and was at all times relevant, a unit manager at the Nebraska State Penitentiary.

5. Defendant Mel Rouf is, and was at all times relevant, a unit administrator at the Nebraska State Penitentiary.

6. On September 24, 2009, Russell was transferred from the Tecumseh State Correctional Institution to the Nebraska State Penitentiary (NSP) and was placed in a cell with inmate Thomas Nesbitt.

7. On September 28, 2009, Russell filed an inmate interview request form asking NSP Housing Unit Manager Curtis Moffat for a cell change because Nesbitt (1) kept odd hours, (2) would not allow Russell to use the desk, (3) required Russell to use the foot of the bed to get into his bunk, (4) told Russell not to drink coffee in

the cell, (5) prevented Russell from using the sink to shave or brush his teeth, and (6) bragged about the number of his cellmates that had moved.

8. Between October 6, 2009, and November 15, 2009, Russell filed numerous requests to be moved, some of which stated he wanted to move into "empty cell 5 D4," claiming he was incompatible with Nesbitt. Specifically, Russell filed three inmate interview requests, an informal grievance, and a step-one grievance.

9. NSP staff denied Russell's requests to be moved to a different cell, stating that he had not explained how he was incompatible with Nesbitt and stating that cell 5 D 4 was occupied.

10. On November 19, 2009, Russell filed a step-two grievance. The step-two grievance contained allegations that Nesbitt made sexual advances toward him, grabbed his hand, and tried to force Russell to "jack him off."

11. NSP reserves single cells for inmates with special mental or physical needs.

12. NSP requires all inmates who desire to change cells to file an inmate interview request form signed by the inmate requesting the change and another inmate willing to cell with the inmate requesting the change. Russell never filed an inmate interview request indicating that another inmate was willing to share a cell with him.

13. On December 14, 2009, NDCS Director Houston responded to a letter that Russell sent to Governor Heineman. In his response, Houston explained that NSP staff reviewed all pertinent information before they assigned Russell to cell with Nesbitt. During this review, NSP staff determined that Nesbitt and Russell were similar in sentence structure, time served, and institutional interests. Houston further explained that NSP records showed that Russell had been living with Nesbitt since September

24, 2009, without incident, and that Russell had repeatedly failed to demonstrate his incompatibility with Nesbitt.

14. On December 17, 2009, the plaintiff was moved from the cell he shared with inmate Nesbitt.

15. On December 21, 2009, Russell filed an inmate interview request listing 38 problems that he experienced while celling with Nesbitt, including that Nesbitt (1) threatened to pour bleach in his mouth if he would not stop snoring, (2) forced Russell to engage in sexual activities on December 13, 2009, and (3) informed Russell that he could kill him and make it look like an accident.

16. As a result of Russell's inmate interview request form, dated December 21, 2009, Nesbitt received a misconduct report and was charged with extortion, sexual assault, and the use of threatening language or gestures. However, the charges against Nesbitt were ultimately dropped because the report did not contain enough substantial evidence to support the charges.

17. On January 15, 2010, Russell was transferred from NSP to the Lincoln Correctional Center (LCC).

INSTRUCTION NO. 5A

I have dismissed Defendants Curtis Moffat and Mark Danner. You should not speculate as to the reasons why I have done so.

INSTRUCTION NO. 6

The plaintiff alleges that the defendants, acting with deliberate indifference, failed to protect the plaintiff from a sexual assault by his cellmate, thereby violating his rights under the Eighth Amendment to the United States Constitution.

The defendants deny they were deliberately indifferent to the plaintiff's safety and claim they were not aware that there was a substantial risk the plaintiff would be sexually assaulted. The defendants also assert that their actions were reasonable and done in good faith consistent with the law.

INSTRUCTION NO. 7

Although there is more than one defendant in this action, it does not follow from that fact alone that if one defendant is liable, all defendants are liable. Each defendant is entitled to a fair consideration of the evidence, and is not to be prejudiced should you find against another defendant.

Unless otherwise stated, all instructions I give you govern the case as to each defendant.

INSTRUCTION NO. 8

Your verdict must be for the plaintiff if all the following elements have been proved by the greater weight of the evidence:

First, inmate Thomas Nesbitt sexually assaulted the plaintiff;

Second, the defendant was aware of the substantial risk of such attack;

Third, the defendant, with deliberate indifference to the plaintiff's need to be protected from this sexual assault, failed to protect the plaintiff; and

Fourth, as a direct result, the plaintiff was damaged.

If any of the above elements has not been proved by the greater weight of the evidence, your verdict must be for the defendant and you need not proceed further in considering this claim.

INSTRUCTION NO. 9

Deliberate indifference is established only if a defendant has actual knowledge of a substantial risk that the plaintiff would be assaulted by his cellmate and if the defendant disregards that risk by intentionally refusing or intentionally failing to take reasonable measures to deal with the problem.

Mere negligence or inadvertence does not constitute deliberate indifference.

INSTRUCTION NO. 10

If you find in favor of the plaintiff under Instruction No. 8, then you must award the plaintiff such sum as you find by the greater weight of the evidence will fairly and justly compensate the plaintiff for any actual damages you find the plaintiff sustained as a direct result of the violation of the plaintiff's constitutional rights.

Remember, throughout your deliberations you must not engage in any speculations, guess, or conjecture and you must not award any damages under this instruction by way of punishment or through sympathy.

INSTRUCTION NO. 11

If you find in favor of the plaintiff under Instruction No. 8 but you find that his damages have no monetary value, then you must return a verdict for the plaintiff in the nominal amount of \$1.00.

INSTRUCTION NO. 12

Your verdict must be agreed to by all of you, that is, it must be unanimous.

INSTRUCTION NO. 13

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the courtroom deputy, signed by one or more jurors. You may summon the courtroom deputy by using the telephone in the jury room to call my chambers at the number provided by the courtroom deputy. The caller should clearly identify himself or herself as a member of the jury so that my staff will react

accordingly. I will respond to your communication as soon as possible either in writing or orally in open court. Remember that you should not tell anyone—including me, how your votes stand numerically.

If you do not agree on a verdict by 5:00 o'clock p.m., you may separate and return for deliberation at 9:00 o'clock a.m. on the next business day. You may deliberate after 5:00 o'clock p.m., but, if so, please notify my staff in advance by using the telephone in the jury room to call my chambers at the number provided by the courtroom deputy. Please also notify my chambers staff by telephone whenever you separate during the day or at the end of the day, and advise when you expect to return to the jury room to reconvene your deliberations. If you do separate, then during that time, you are not allowed to discuss this case with anyone, even another juror.

Fourth, your verdict must be based solely on the evidence and law which I have given to you in my instructions. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, complete it pursuant to the instructions on the form, and advise my chambers staff by telephone when you are ready to return to the courtroom to deliver your verdict.

Submitted at 11:24 o'clock a.m. / p.m.

DATED this 22~~d~~ day of September, 2011.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'R. G. Kopf', written over a horizontal line.

Richard G. Kopf
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PATRICK RONALD RUSSELL,

Plaintiff,

v.

ROBERT HOUSTON,
DENNIS BAKEWELL,
MICHAEL EDISON, and
MELVIN ROUF,

Defendants.

4:09CV3249

VERDICT FORM

Please answer the following questions in accordance with the jury instructions and the instructions contained in this form. It is possible that you will answer some but not all questions.

VERDICT

A. Liability

Note: Complete this Part A of the Verdict Form by writing in the names required by your verdict.

1. Defendant Robert Houston

On Plaintiff's claim against Defendant Robert Houston, we find in favor of:

[Plaintiff Patrick Russell] **COPY** [Defendant Robert Houston]

2. Defendant Dennis Bakewell

On Plaintiff's claim against Defendant Dennis Bakewell, we find in favor of:

[Plaintiff Patrick Russell] or [Defendant Dennis Bakewell]

3. Defendant Michael Edison

On Plaintiff's claim against Defendant Michael Edison, we find in favor of:

[Plaintiff Patrick Russell] or [Defendant Michael Edison]

4. Defendant Melvin Rouf

On Plaintiff's claim against Defendant Melvin Rouf, we find in favor of:

[Plaintiff Patrick Russell] or [Defendant Melvin Rouf]

COPY

B. Damages

Note: Complete this Part B of the Verdict Form only if you have found in favor of Plaintiff on his claim against one or more Defendants. Otherwise, leave the space below blank and proceed to Execution of Verdict Form.

We find Plaintiff's actual damages to be:

\$_____ (stating the amount or, if you find that Plaintiff's damages have no monetary value, set forth the nominal amount of \$1.00).

EXECUTION OF VERDICT FORM

Note: The Foreperson shall sign and date the verdict form, and such signature shall mean that the verdict of the jury was unanimous.

DATED this _____ day of _____, 2011.

COPY

.....

FOREPERSON